DEPARTMENT OF WILLS, EXECUTORS, ADMINISTRATORS.

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FISHER *v.* WISTER, APPELLANT.[1] SUPREME COURT OF PENNSYLVANIA.

Will—Executory Devise in Case of Intestacy.

Testator, in the second paragraph of one of the clauses of his will, gave a portion of an estate known as the Wakefield Mills in trust for his two grandsons, naming them. In the third paragraph he gave the remaining portion of the Wakefield Mills estate in trust for the two grandsons and their sister, naming all the persons. Immediately after the gift was a reference to the property devised to the grandsons in the second clause. Following this reference was the following: "I hereby forbid that the property shall be sold out of the family, but leaving them to dispose of their respective parts by will. In case of the death of either one of them intestate without direct heirs, I direct that such intestate part shall be held by his sister." *Held*, that the attempt at an executory limitation in case of the death of the grandsons intestate, without direct heirs, transgressed the rule that it must not be within the power of the first taker to defeat the devise over either by the execution of a will or a deed.

EXECUTORY DEVISES TO TAKE EFFECT IN CASE OF THE NON-DISPOSITION OF THE ESTATE BY THE FIRST TAKER.

It may now be said to be fairly well-settled law, both in England and this country, that a devise over in case of the intestacy of the first taker is void; and the same is true of a devise over of what the first taker has not disposed of in his lifetime. The rule is that where the contingency or condition upon which the executory devise is to take effect is the non-disposition of the estate of the first taker, whether in his lifetime by deed or other conveyance, or upon his death by will, the devise over is void. It may be interesting, however, to inquire into the origin of this rule and trace its growth from its first appearance down to the present time, particularly as the English and American courts, while agreeing upon the rule, have derived it from separate and distinct sources, and by a different course of reasoning.

The case to which the English

[1] Reported in 154 Pa. St., 65.

courts ascribe the origin of this rule is that of Gulliver *v.* Vaux, 8 D. M. & G., 167, a *nisi prius* case decided in 1746, but not reported until more than a century later. In this case there was a devise of real estate to the testator's children, and in case of the death of the children without leaving issue and "without appointing the disposal of the same," then over. It was argued that the devise over was not good as an executory devise because it was too remote. This contention, however, was not sustained, and two of the judges gave opinions holding the devise over valid. The third judge rendered an opinion in which he concurred with his brethren as to the validity of the devise over on the score of remoteness, but insisted that the gift over was bad because it was to take effect upon a void contingency.

"But I am clearly of the opinion," said the learned judge, "that this condition or contingency annexed to the estate of the children and precedent to that of the devisee's estate, is a void condition, and consequently the devise dependent upon it can never take place. A condition or contingency repugnant to the estate devised must be void; thus a devise to one in fee, upon condition that he shall not alien, is void: Co. Litt., 223. So a devise in fee upon condition that the wife shall not be endowed or the husband be tenant by the curtesy is void because repugnant to the estate devised: Mary Partington's Case, 10 Co., 38; Sir Anthony's Case, 6 Co., 41a. So feoffment in fee, upon condition that the feofee's daughters shall not inherit, is void because repugnant to the nature of the estate. What is the condition here? That if" the children die without issue "the heirs shall not take by descent, but by appointment, whereas a devise to a man's heir at law, or grant to heirs is void, and he will take by descent: Counden *v.* Clerke, Hob., 30. In this case, therefore, a devise in fee, upon the condition that his heirs shall not take by descent, unless he specially appoint them is a void condition, and consequently the devise subsisting on that condition is void." The opinion of the latter judge finally prevailed, the two other judges concurring with him upon conference.

The argument here is as follows: The devise over in default of issue or appointment by its terms precludes the heirs from taking save by appointment. But an heir cannot take by appointment, but only by descent. Therefore, the devise over precludes the heirs from taking at all, and thus the fee simple in the hands of the children would be deprived of one of its essential incidents, viz., that of descending to the heirs in accordance with the rules of common law, and is consequently void because repugnant to the devise to the first taker.

The weak point in this argument lies in the fact that every executory devise deprives the estate of the first taker of some one of the essential elements of a fee simple, and is thus to a certain extent repugnant to the estate of the first taker. Take the case of an ordinary executory devise; "to A and his heirs; but if A die without issue living at his death, then over to B." The words "to A and his heirs" taken alone vest in A an absolute fee simple, which is freely alienable and descendible to his heirs; but the devise over stipulates that un-

less A dies leaving issue, B shall have the estate. Is not that devise over repugnant to the absolute fee simple? Does it not deprive the estate which A would take, were it not for the devise over, of some essential incident of a fee? It is clear that while A may sell his estate, he cannot convey a perfect title to it. His title has a cloud upon it, and that cloud is the limitation over to B. The incident of alienability is, therefore, if not destroyed, very sensibly diminished. It is also perfectly clear that the estate cannot descend to A's heirs unless he dies leaving issue, or in other words, only A's issue can inherit the estate, and thus the incident of being descendible to heirs, in accordance with the rules of common law, is taken away.

It is thus very clear that the most common form of an executory devise deprives the estate of the first taker of the very incident which the estate of the first taker in Gulliver *v.* Vaux was deprived of, and is, therefore, open to the same objection. The validity of the executory devise just spoken of is too well established to admit of any doubt, and thus the argument in Gulliver *v.* Vaux falls to the ground. The fallacy of this argument lies in the fact that the estate of the first taker was not an absolute fee simple, but only a qualified fee simple, to which the incident of descending to heirs in accordance with the rules of common law does not necessarily belong.

In dealing with executory limitations of personalty the courts at a very early date laid down the rule that gifts over of what remained undisposed by the first taker were void, because as was said by Lord TRURO in Watkins *v.* Williams, 3 Macn. & G., 622, 629, "it might be very difficult and even impossible to ascertain whether any part of the fund remained undisposed or not." This reasoning, it will be readily seen, does not apply to gifts of real property, for it would be simple enough to determine how much of a given piece of real estate was left undisposed of by the first taker. It is perhaps not surprising therefore, when it is remembered that Gulliver *v.* Vaux was not reported until 1856, to find that before that time two cases were decided which seem to lay down a contrary rule.

The first of these cases is that of Beachcroft *v.* Broome, 4 T. R., 441, decided in 1791. In this case there was a devise over in case of death without settling or disposing of the estate. The question was whether the first taker could sell and defeat the limitation over. The court held that he could, KENYON, Ch. J., saying: "I should have thought it extremely clear that on failure of the first limitation, the second might have taken effect as an executory devise." Though this remark of Lord KENYON was not necessary to the decision of the case, it shows clearly that he had either never heard of the doctrine of Gulliver *v.* Vaux, or that he disapproved of it.

The second case is that of Doe d. Stevenson *v.* Glover, 1 C. B., 448 (1845). In this case there was a devise to A and his heirs, but if A should die without issue then living and should not have disposed of or parted with his interest in his lifetime, then to B; and it was held that the executory devise to B was valid.

It will thus be seen that a distinction in regard to gifts over in

case of non-disposition was made between gifts of realty and gifts of personalty, and that as late as 1845. Gulliver *v.* Vaux had not been followed. In 1856 an energetic lawyer by the name of Lee, having made a diligent search among the manuscripts in Lincoln's Inn Library, brought to light the case of Gulliver *v.* Vaux, and upon it mainly was the decision in Holmes *v.* Godson, 8 D. M. & G., 152, based. In this latter case there was a devise to A and his heirs, but if A died without making a will, then to B. Lord Justice TURNER in deciding the case said that it seemed to him that there was no distinction between cases relating to real and personal estate. "In truth the decisions in both cases turn, as I apprehend, on this: The law has said that if a man dies intestate, the real estate shall go to the heir, and the personal estate to the next of kin, and any disposition which tends to contravene that disposition which the law would make is against the policy of the law and therefore void."

This is merely another form of stating the reasoning laid down in Gulliver *v.* Vaux for a "disposition which tends to contravene that disposition which the law would make" is a disposition which attempts to deprive the estate of its incident of being descendible according to law. It is true that FRY, J., in Shaw *v.* Ford, L. R., 7 Ch. D., 669, draws a distinction between the two reasons. He says (pp. 673-4): "*Prima facie*, and speaking generally, an estate given by will may be defeated on the happening of any event; but that general rule is subject to many important exceptions. One of those exceptions may, in my opinion, be expressed in this manner, that any executory devise, defeating or abridging an estate in fee by altering the course of its devolution, which is to take effect at the moment of devolution and at no other time, is bad. The reason alleged for that is the contradiction or contrariety between the principle of law which regulates the devolution of the estate and the executory devise which is to take effect only at the moment of devolution and to alter its course. I am not bound to inquire into the logical sufficiency of the reason given, because it appears to me that the exception is well established by the cases of Gulliver *v.* Vaux, Holmes *v.* Godson and Ware *v.* Cann. Another exception to the general proposition which I have stated is this, that any executory devise which is to defeat an estate, and which is to take effect in the exercise of any right incident to that estate, is void; and there again the alleged reason is the contrariety or contradiction existing between the nature of the estate given and the nature of the executory devise over." It will be seen, however, that the final reason suggested by FRY, J., for holding an executory devise bad in the two instances given, is the "contrariety or contradiction between the principle of law, which regulates the devolution of the estate, and the executory devise which is to take effect only at the moment of devolution." Evidently, what is meant by the words "contrariety or contradiction" existing between the nature of the estate given and the nature of the devise over, is that the latter by its terms deprives the former of some one or more of its essential incidents. Thus in Gulliver *v.* Vaux the devise over de-

prived the estate of its incident of descendibility, and in Stephenson *v.* Glover the devise deprived the precedent estate of the incident of being aliened by will.

A reason for holding void a gift over in case of intestacy, is suggested by Sir GEORGE JESSEL *in re* Wilcock's Settlement, 1 Ch. D., 231, where he says, it is because a man cannot give property absolutely, and at the same time say it shall not devolve according to law. This, however, is merely another way of saying, that where an executory devise by its terms would change the manner of devolution of the preceding estate, it deprives it of one of the common law incidents of a fee.

It will thus be seen that the reasoning of the English Courts in arriving at the rule under consideration, is that an executory devise to take effect in case of the non-disposition of the estate of the first taker, whether by will or deed, deprives the first estate of some one of its essential incidents, and is, therefore, repugnant to it and void. That this reasoning is fallacious has been clearly shown, the fallacy lying in the fact that every executory devise deprives the estate upon which it is limited of some incident essential to an absolute fee simple, so much so that the estate upon which the executory devise is limited, is called not an absolute fee, but a *qualified fee.*

In America the courts have laid down a rule which, though differing from the English rule in principle, amounts practically to the same thing on account of the extended application which has been given to it.

The first case in this country which decided that a gift over in case the first taker had not disposed of his interest was void, is that of Ide *v.* Ide., 5 Mass., 500, decided in 1809. In this case there was a devise over "of what estate devised to him he shall leave." Chief Justice PARSONS, in deciding the case, held, that from the terms of the devise over an intention of the testator was implied that the first taker should have an "absolute property" in the estate devised, and that a limitation over was "inconsistent with such absolute proprietorship" in the first taker, and, therefore, void. Here we see an entirely new reason advanced for holding void executory devises to take effect in case of a non-disposition of the estate by the first taker. For this new view of the question, the only authorities cited by the chief justice are the case of Attorney-General *v.* Hall, Fitz., 314, but better reported in W. Kel., 13, and Fearne, on Remainders, 226, 227. Let us glance at these authorities for a moment, and see whether they fairly sustain the rule as laid down by Chief Justice PARSONS.

Attorney General *v.* Hall was a case in which a testator devised realty and personalty to his son, Francis Hall, and the heirs of his body, and if he should die leaving no heirs of his body living, then so much of the real and personal estate as he should be possessed of at his death to go to the Goldsmith's Company. Francis Hall suffered a common recovery, and devised the real and personal estate to his wife, and then died without issue. A question arose between the wife, claiming under her husband's will and the company claiming by virtue of the limitation over

in case of the son dying without heirs of his body. The Court decided in favor of the wife, holding the limitation to the Goldsmith's Company void.

The grounds for this decision do not clearly appear from the report of the case. It will be seen at a glance, however, that a proper common law construction of the words of the testator's will would give to Francis Hall an estate tail in the real property with a contingent remainder to the Goldsmith's Company: Fearne on Remainders, Ed. 1845, p. 387; and an absolute estate in the personalty: Tudor's Lead. Cas. on Real Prop., p. 861, *et seq.;* the limitation to the Goldsmith's Company being void at common law, because Francis Hall had not merely the *use* of the personalty, but the personalty itself: Fearne on Remainders, p. 402. According to this construction, Francis Hall, by suffering the common recovery, barred the contingent remainder to the Goldsmith's Company, and became seized of the real proprety in fee. As the limitation over of the personalty was void, both realty and personalty passed to the wife by virtue of Francis Hall's will, and she was, therefore, entitled to hold them against the Goldsmith's Company.

That such was the construction which the court placed upon the will of the testator, though it does not, as was said above, clearly appear from the report of the case, will become plainly evident upon a more careful examination of the case, and upon reference to comment upon the case by Lord HARDIWICKE.

In the report of Attorney General *v.* Hall, to be found in W. Kel., 13, it is said: "As to the real estate, the defendant . . . pleaded a common recovery . . . and upon arguing this plea the court allowed the same . . . so that the only question now before the court was whether the limitation over to the Goldsmiths' Company was a good limitation over of personal estate." It is thus very clear that so far as the real property was concerned, the construction mentioned above is that adopted by the court, and that so far as the validity of an executory limitation was concerned, the decision was in regard to personalty alone.

In regard to the personal property it was argued at great length that the limitation over was void, and two grounds for the argument were suggested: (1) That the personalty was "vested" and not the "use only devised," and (2) that the limitation over was void because "not confined to dying without issue at the time of Francis Hall's death." The opinion of the Court is reported as follows: "In regard the ownership and property of the personal estate was vested in Francis Hall and not the use only; this was held to be a void limitation to the Goldsmith's Company. It is giving a man a sum of money to spend and limiting over to another what does not happen to be spent." These words, while by no means clear, strongly support the inference that the court held the limitation void because Francis Hall had not merely the use of the personalty, but the personalty itself. The correctness of this inference appears to be practically certain when we read Lord HARDWICKE'S comment on the case in Flanders *v.* Clark, 1 Ves., 9, where he says: "In Attorney General *v.* Hall the

testator gave to his son personal estate, and if he died without issue then so much as shall remain to the Goldsmith's Company; the son died with[out] issue *and it was insisted that he had only an usufructory interest and so to go over;* but it was determined by Lord KING that he had the absolute property and therefore the devise was void; for he had power to spend the whole, which was an absolute gift."

It seems, therefore, almost absolutely certain that all the case of Attorney General *v.* Hall decides is that a common recovery will bar a contingent remainder limited on an estate tail and that an executory limitation of *personalty* is not good where the first taker has an absolute property in the estate as distinct from a gift of the mere use of it. That this case, therefore, is in no way applicable to the case of an executory devise of real property to take effect in case the first taker does not dispose of his estate, is too apparent to necessitate further comment, and yet this is the only plausible authority for Chief Justice PARSON'S view, the passage cited from Fearne being wholly inapplicable.

Thus we see that in this country the rule in regard to executory devises to take effect in case of a non-disposition of the estate by the first taker owes its origin to an entire misconception of an old English case. No court has as yet recognized the fact that Ide *v.* Ide is based upon a misconception of Attorney General *v.* Hall, and throughout a long line of decisions we find the two cases cited again and again with approval as positive authority for the rule. In Jackson *v.* Bull, 10 Johns., 19 (1813), Jackson *v.* Delancey, 13 Johns., 537 (1816) and Jackson *v.* Robins, 16 Johns., 537 (1819), both cases are cited with approval and in the latter case there is a long and exhaustive opinion by Chancellor KENT. He says that there was no distinction between personalty and realty made in Attorney General *v.* Hall. He says that Lord HARDIWICKE gives his sanction to it in Flanders *v.* Clark, 1 Ves., 9, and adds that Lord KENYON'S remark in Beachcroft *v.* Broome, 4 T. R., 441, must have been made in loose conversation on the bench. It seems almost incredible that as able a man as the Chancellor should have failed so entirely to get at the gist of the decision in Attorney General *v.* Hall, and what is still more incomprehensible is that he should have misconstrued the true meaning of the case after reading, as he must have read, what Lord HARDIWICKE said of it in Flanders *v.* Clark.

Chancellor KENT, in addition to citing Ide *v.* Ide with approval, suggests another reason why such executory limitations are void. He says that it is of the essence of an executory devise that the estate upon which it is limited shall not be subject to destruction or alteration by the first taker. As authority for this statement the Chancellor cites Fearne on Remainders, 418, where will be found the following clause: "It is a rule that an executory devise cannot be prevented by any alteration whatsoever in the estate out of which or after which it is limited;" but it will be very clearly seen on an examination of Fearne that the learned author never meant to lay down as a principle of law the view which the Chancellor cites him as expressing.

The meaning of this clause in Fearne is simply that an executory devise differs from a contingent remainder in that it cannot be barred by a fine or common recovery, which appears very clearly in the opinion of Mr. Justice WARDLAW in Andrews *v.* Roye. (See *infra* this article.)

In Armstrong *v.* Kent, 1 Zab. (N. J.), 509 (1848), the limitation over was on the death of the first taker "without heirs and intestate." The Court cited the cases of Ide *v.* Ide and Jackson *v.* Robins, with approval, saying that it was "well settled that where there is an absolute power of disposition given by the will to the first taker, the limitation over . . . is void as being inconsistent with the absolute estate or power of disposition expressly given or necessarily implied," and "a power to devise by will is as absolute a power as a power to convey where conveyance means by bargain and sale."

In Hubbard *v.* Rawson, 4 Gray, 247 (1855), it is true a different rule is apparently laid down. A devise over in these terms, "and if she make no disposition, the remainder to be conveyed to her children," was held valid. The case of Ide *v.* Ide was referred to, but passed by with the remark that it was not "parallel," the Court saying: "This devise over is inconsistent with the idea that the testator intended to devise an absolute estate to 'the first taker' so that in event of her death it would descend to her children or heirs at law as her intestate estate. . . . The result to which we come is that "the first taker" had only an equitable fee contingent, liable to be defeated upon her dying before her husband in case the estate was not conveyed by her order and she had made no disposition of the property by will or other writing." However, in a subsequent case, Gifford *v.* Choate, 100 Mass., 343 (1868), in the same court Ide *v.* Ide is cited with approval, and, therefore, Hubbard *v.* Rawson must be considered as anomalous.

In Hall *v.* Robinson, 3 Jones Eq. (N. C.), 348 (1857), while the Court recognized the rule that the absolute power of disposition in the first taker will defeat a limitation over, it was held that the power to dispose of by will alone was not an absolute power of disposition.

In Andrews *v.* Roye, 12 Rich. (S. C.), 536 (1860), there is a distinct dissent from Chancellor KENT'S view, viz., that there can be no executory devise limited on an estate over which the owner may exercise an absolute power of disposition, because it is of the essence of such a devise that it cannot be prevented or defeated by the first taker.

Mr. Justice WARDLAW criticizes this view of the law, and says it is not found in any English book and that respectable authority may be found for the validity of such limitations over, citing Beachcroft *v.* Broome and Stevenson *v.* Glover. He says: "It is said to be of the essence of an executory devise that it cannot be prevented or defeated by the first taker by any alteration of the estate out of which or after which it is limited, or by any mode of conveyance. This is altogether true as to the right of the first taker to bar the executory devise by fine or common recovery; but it is altogether fallacious if pressed to the conclusion that the executory devise must be independent of the will or action of the owner of the

precedent estate. In fact, all executory devises depend to some extent on the discretion of the first taker. The most common case of a limitation over in this mode is on the contingency of the first taker dying without issue at his death, and may he not marry with the prospect of procreation, or refrain from marriage at his caprice? So, too, in many other instances, there may be valid executory devises dependent on the personal action of the primary donee, as that he shall marry with the consent of the executors, shall go to Paris, shall reside in Charleston, and shall not visit Nahant or Newport."

It is to be observed, however, that in a subsequent case in the same court, it was held that a devise over in case the first taker should die without leaving a will was void, because dependent on a condition repugnant to the devise: Moore *v.* Sanders, 15 S. C., 440 (1881).

In Karker's Appeal, 60 Pa., 141 (1869), there was an executory devise over in case the first taker died intestate and without issue. The court below, BREWSTER, J., in a long opinion in which he cites Gulliver *v.* Vaux, Holmes *v.* Godson, and Jackson *v.* Robbins, held that the executory limitation over was void, as it was an attempt by the testator "to make a new law of intestacy," which "has not been favored by the courts." The Supreme Court affirmed the decision of the lower court in an opinion by READ, J., in which "Jarman on Wills" is cited as follows: "If, therefore, lands be devised to A and his heirs upon condition that he shall not alien or charge them with an annuity, the condition is void. And in like manner a condition or conditional limitation annexed to a devise in fee, purporting to give the property over in case the devisee shall die intestate or shall not part with the property in his lifetime, is repugnant and void, since in the first case it would not only defeat the rule of law, which says that upon the death intestate of an owner in fee simple his property shall go to his heirs at law, but also deprive him of the power of alienation by act *inter vivos*, and in the second case it would take away the testamentary power from an owner in fee": Jarman on Wills, Vol. II, p. 15.

In Gillmer *v.* Daix, 141 Pa., 505 (1891), the devise over was expressed in these terms, viz.: "Should he die without leaving to any person, then to my brother." The Court in a *per curiam* decision, held, that the most they could make of the clause was that it was an expression of the testator's desire that her son should make a will, but added that even though the clause denoted a condition that he should make a will, the condition was void under the authorities.

In Fisher *v.* Wister, 154 Pa., 65 (1892), the Court handed down a *per curiam* decision, in which they adopt the reasoning of the learned master. The master adopts Chancellor KENT'S view, that no executory devise can stand where the first taker has an absolute power of disposition.

From this review of the American cases, it will be seen that while two cases, Hubbard *v.* Rawson and Andrews *v.* Roye, deny the correctness of the rule evolved from Attorney General *v.* Hall, and while one case, Karker's Appeal, intimates that the reason for the

rule is that a testator cannot make a new law of intestacy, yet the great weight of authority supports the view of Chief Justice PARSONS and Chanceller KENT, that there can be no executory devise limited upon an estate to which there is annexed the absolute power of disposition.

The reason for this view has been said to be that a valid executory devise cannot be defeated at the will and pleasure of the first taker, and Fearne has been cited as an authority to that effect: Jackson *v.* Bull, 10 Johns., 19. Mr. Justice WARDLAW has, however, very clearly demonstrated the fallacy of this reasoning in Andrews *v.* Roye (*supra*), and the real reason for the rule is, perhaps, nowhere as clearly stated as by Mr. Henry Budd in a note to Sharswood and Budd's 2 Lead. Cas. on Real Prop., p. 482, where he says: "It is equally true that in the case of an executory devise the court does recognize a qualified fee simple, and the only reason that a general power of disposition added thereto will destroy a devise over, is that the general power adds to the qualified fee just these qualities in which the qualified fee was lacking, and, therefore, converts it into an absolute fee simple, thereby exhausting the entire estate of the devisor."

To the mind of the writer, there seems to be considerable force in this contention. Where an estate is given to "A and his heirs," A undoubtedly has the absolute control of the estate, which includes the absolute power of disposition, and the estate is called an absolute fee simple. When an executory devise is tacked on to such an estate, this absolute control, and with it the absolute power of disposition, is qualified and made subject to the devise over, and the estate is called a qualified fee simple.

It is, therefore, of the very essence of an executory devise to reduce the estate upon which it is limited from an absolute fee simple to a qualified fee simple. It is impossible for an executory devise to be limited upon an absolute fee simple, because the very act of so limiting it, reduces the absolute fee to a qualified fee. An absolute fee simple and an executory devise cannot exist together, because the presence of the latter always reduces the former to a qualified fee simple. The two estates are accordingly said to be repugnant to each other.

Now, when either expressly or from the terms of the devise over, the absolute power of disposition is given to A, the owner of the estate upon which the executory devise is limited, A's estate possesses all the characteristics and incidents which it had before the executory devise was limited upon it. The qualified fee becomes once more an absolute fee, or, in other words, we have a case of an executory devise, limited upon an absolute fee without reducing it to a qualified fee. But as has just been said, these two estates cannot exist together, for they are repugnant to each other. It may, therefore, well be contended that any attempt at executory limitation, which creates such a repugnancy, should not be upheld.

However, it may on the other hand be contended as follows: In the case of the ordinary example of an executory devise "to A and his heirs, but if A die without leaving issue living then to B," the estate will eventually go to B and

his heirs unless A die leaving issue. It is clear, therefore, that A's estate, though a fee simple, is qualified in this respect—that it cannot descend to his heirs unless he die leaving issue. It will thus be seen that A's estate differs from an absolute fee simple in that it cannot, on his death, descend to his heirs unless they are his issue. A's estate is, therefore, qualified in respect to its incident of descendibility as well as its incident of alienability. Consequently, even though the absolute power of disposition were given to A, his estate does not, as was contended above, possess *all* the characteristics and incidents which it had before the executory devise was limited upon it. It still lacks the essential incident of an absolute fee simple of being descendible to heirs general, and is, therefore, still a qualified fee, and consequently is not repugnant to a limitation over.

From the standpoint of strict logical reasoning the latter contention appears to carry with it considerable force. However, the point is such a nice one, and the reasoning partakes so much of the nature of "hair splitting," that the question may, perhaps, be said to be one for the policy of the law to settle. That it has been settled both in England and this country, to judge from the cases cited, seems clear. It is a curious and interesting fact to notice, however, that the considerations which led to the adoption of the rule in England were entirely fallacious, and yet have considerable support among the authorities; while the considerations which led to the adoption of the rule in this country, though from a logical standpoint much less open to the charge of fallacy, are, however, entirely without the support of authority among the old English books. The American rule, therefore, seems to be a new doctrine, the outgrowth of a misconception. It hardly seems possible that anything good in law can be based upon a mistake, and yet there would, perhaps, be very little to complain of if the application of the rule were limited to those cases to which it strictly applies.

The rule has, however, been extended in its application to cases where the disposing power of the first taker is very greatly qualified, as was the case in Fisher *v.* Wister. It will be readily seen that where the first taker does not possess the absolute power of disposition his estate is not an absolute fee simple, and might, therefore, well support an executory limitation. This extended application seems, therefore, to be unwarranted and weakens to a great extent the soundness of the rule.

In concluding this article it is proper to remark that this subject has been previously treated by a no less able writer than Mr. John C. Gray, in his very excellent work on "Restraints on Alienation." In justice to himself, the writer desires to say that Mr. Gray's discussion of the subject was not discovered until after the preparatory work on this article had been completed, and at a time when half of the final work had been finished. If an excuse were needed for publishing this article after such a discovery, it is sufficient to mention the exceeding interest of the subject, and the fact that Mr. Gray's work may not be readily accessible to many of the readers of the AMERICAN LAW REGISTER AND REVIEW.

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